

Southern Meats Pty Ltd (Migration) [2024] AATA 192 (29 January 2024)

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DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Southern Meats Pty Ltd

VISA APPLICANTS: Mr Zhaonan CHEN
Mrs Linyan Tang
Master Yuhan Chen
Master Yumo Chen

REPRESENTATIVE: Mrs Lisa Chanesman (MARN: 0786010)

CASE NUMBER: 2212846

HOME AFFAIRS REFERENCE(S): BCC2022/194936

MEMBER: George Hallwood

DATE: 29 January 2024

PLACE OF DECISION: Adelaide

DECISION: The Tribunal remits the application in relation to the primary applicant for GK – Temporary Skill Shortage (Class GK) visa for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 482 - Temporary Skill Shortage visa:

- Public Interest Criterion 4020 for the purposes of cl 482.217 of Schedule 2 to the Regulations

Statement made on 29 January 2024 at 9:40am

CATCHWORDS

MIGRATION – Temporary Skill Shortage (Class GK) visa – Subclass 482 (Temporary Skill Shortage) – bogus document – certificate of employment – flexible working hours – identity requirements – combined review applications – decision under review remitted

LEGISLATION

Migration Act 1958, ss 5(1), 65, 338

Migration Regulations 1994, Schedule 2, cl 482.217; Schedule 4, Public Interest Criterion 4020; rr 2.08, 4.13

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Sharma v MIMAC [2013] FCCA 1280

Singh v MIMAC [2013] FCCA 1435

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 15 August 2022 to refuse to grant the applicants GK – Temporary Skill Shortage (Class GK) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
4. The applicants applied for the visas on 8 February 2022. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl 482.217 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because they found there was evidence before the Minister that the applicant had provided, or caused to be provided, a bogus document or false or misleading information in relation to this visa application.
5. The Tribunal is also aware of an issue as to whether the correct fees were paid in relation to the secondary applicants in this matter.
6. Mr Kendall Conroy appeared before the Tribunal on behalf of the review applicant Southern Meats Pty Ltd on 1 November 2023 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Zhaonan Chen, the primary visa applicant. The Tribunal hearing was conducted with the assistance of an interpreter in the Mandarin and English languages.
7. The hearing recommenced on 19 January 2024 to hear arguments in relation to payment of fees and jurisdiction. In this matter the review applicant and the visa applicants are not the same person. The Tribunal's jurisdiction in relation to the secondary applicants is set out at paras 37- 47 below.
8. The review applicant was represented in relation to the review.
9. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

10. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 482.217 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and

- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).
11. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

12. The term ‘information that is false or misleading in a material particular’ is defined in PIC 4020(5) and the term ‘bogus document’ is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of ‘information that is false or misleading in a material particular’ in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a ‘false or misleading’ statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
13. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
14. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
15. The Tribunal takes a fresh look at the matter to make its decision. In this case it is satisfied that the Decision Record of the delegate dated 15 August 2022 provides a summary of the evidence used by the delegate to determine the applicant had given, or caused to be given a bogus document, or information that is false or misleading in material particular. The delegate’s dissatisfaction with a certificate of employment dated 13 December 2021 provided by the applicant is centred on inconsistent wage information and inconsistent work hours provided by the applicant on behalf of the TSS visa applicant Mr Zhaonan Chen, and the representative of the applicant’s employer in China, Mr Jin of Fujian Xinrunyuan Imp & Exp Trade Co:

In consideration of all the information available to me, I am not satisfied that the response and documentation provided by the applicant alleviates the concerns regarding the legitimacy of the employment work reference provided on 8 February 2022.

The applicant and Mr Jin have stated in their written submissions that the salary of employees has increased due to COVID 19 but both statements do not provide the same salary figure. Mr Jin states “...wages of workers are generally raised to between 4,000 – 5,000 RMB” but does not specifically state what the applicant’s salary is. The applicant states a range of the salary

amount over the last few months but does not provide detail as to what specific month it changes and the specific amount it has been. I note that the payslips provided for April and May state a salary of 4100 RMB, however these payslips are internally generated and are not corroborated by third party financial evidence.

Furthermore, it is explained in both written submissions from Mr Jin and the applicant that the working hours of the applicant often change due to different production needs on the day. This does not explain why on two separate occasions on the telephone, that Mr Jin gave specific hours for the applicant which is inconsistent to his written submission and the applicant's. Mr Jin did not explain on either occasion that the applicant may have varied working hours.

16. Mr Chen advised the Tribunal that he started working at Fujian Xinrunyuan Import & Export Trade Company as a boner in 2016. When asked to explain the inconsistencies in hours worked Mr Chen told the Tribunal that working hours were flexible: "When meat is sent to the factory it has to be processed". He said that Mr Jin had responded to questions from the Department with the hours the factory was operating on that particular day.
17. When asked to explain the differences in wages during 2022 Mr Chen told the Tribunal this was because the local area had gone into lockdown during the COVID pandemic and some workers couldn't come to work, so the business increased salaries for those that had to do extra work during that time. He also told the Tribunal that he was paid in cash as most people are in rural China so he was only able to provide his pay slips as evidence.
18. The applicant's submission of 25 October 2023 states that Mr Jin had correctly answered the Department's questions about working hours on two occasions, and that they had varied because the working hours of the business changed based on seasonal and other factors. Mr Jin did not explain this was the case because he was not asked to, he simply answered the question "what are the daily working hours?" correctly on two different occasions. The submission also states that the difference between the monthly salary range of 4,000 to 5,000 RMB given by Mr Jin on 25 June 2022 was different from the 3,700 RMB shown in a payslip for January 2022 is as a result of increases in wages.
19. The applicant provided corroborative evidence in the form of a written explanation by Mr Rong Jin, Production Manager, dated 15 July 2022 setting out that wages had been increased in April 2022 following a COVID - 19 outbreak in March 2022 due to a 'serious shortage of labour in the region'. The letter also goes on to state:

We have to constantly adjust the time according to the needs of production. Sometimes we even need to determine the working time of the workers on the second day according to the time of the carcasses delivered from the slaughterhouse the next day. Sometimes we need to advance the work time according to the needs of major customers. Therefore, our working hours are uncertain.
20. A copy of an announcement of a salary increase at Fujian Xinrunyuan Import & Export Trade Company dated 31 March 2022 was also provided to the Tribunal. The announcement states that the monthly salary of the boner and slicer was to increase by RMB 600 yuan. This document also corroborates the applicant's evidence.

21. PIC 4020 requires, relevantly, that there is evidence before the Minister that the applicant has given a bogus document. On the face of this, 'evidence' can be any evidence whether or not that evidence is genuine or probative. While it is implied under PIC 4020 that there is a need for the evidence to be probative,¹ in relation to a bogus document there is only a requirement to find under the relatively undemanding test that there is a 'reasonable suspicion' a bogus document has been submitted in connection with the visa application.²
22. A 'bogus document', as defined in s 5(1), i.e. a document that relevantly the Tribunal reasonably suspects is a document that:
- a) purports to have been, but was not, issued in respect of the person, or
 - b) is counterfeit or has been altered by a person who does not have authority to do so, or
 - c) was obtained because of a false or misleading statement, whether or not made knowingly.
23. The delegate was not satisfied with payslip evidence corroborating the salary Mr Chen had received without third party financial evidence. The Tribunal does not find there is a requirement for this and is satisfied that Mr Chen's oral evidence was truthful and was also supported by documentary evidence provided to the Tribunal.
24. Mr Conroy provided oral evidence that Southern Meats Pty Ltd had Mr Chen's skills assessed in January 2020 and then interviewed Mr Chen via videolink soon afterwards. Mr Conroy said that this was Southern Meats Pty Ltd's normal practice for determining the skills of potential sponsored visa applicants. During the hearing the applicant's representative played a video recording of Mr Chen undertaking the skills assessment as described by Mr Conroy.
25. The bogus document referred to by the delegate is a certificate of employment dated 13 December 2021. On the evidence provided the Tribunal is satisfied that this certificate: was issued in respect of Mr Chen; is not counterfeit nor been altered by a person who does not have the authority to do so; and, was not obtained because of false or misleading statement.
26. On the evidence of the applicant, the Tribunal is satisfied that the documents provided by the applicant are genuine and the Tribunal harbours no reasonable suspicion they are bogus.
27. As the requirement of PIC 4020 relates to false or misleading information, this requirement is temporally aligned to: 'at the time it is given'. The Tribunal is satisfied, on the evidence previously discussed, that on each occasion information about wages and hours worked was provided in relation to this application, the information was truthful and not misleading.
28. Therefore, the applicant meets PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

29. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and

¹*Sharma v MIMAC* [2013] FCCA 1280 at [33]–[37]

²*Singh v MIMAC* [2013] FCCA 1435 at [25]

ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).

30. At the hearing Mr Chen was asked whether the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and continuing until today. Mr Chen answered "No". There is nothing before the Tribunal indicating otherwise.
31. Therefore, PIC 4020(2) is met.

Has the applicant satisfied the identity requirements?

32. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity.
33. The Tribunal had access to Mr Chen's passport issued on 10 March 2015, and his Pearson PTE Academic test report dated 13 August 2019 all containing photographic identification. Mr Chen also showed his identification card from 2015 to the Tribunal at the video hearing.
34. Based on these photographic identity documents, and the absence of evidence to the contrary, the Tribunal is satisfied as to the applicant's identity.
35. Therefore, the applicant meets PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

36. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).
37. At the hearing Mr Chen was asked whether the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending today. Mr Chen answered "No". There is nothing before the Tribunal indicating otherwise
38. Therefore PIC 4020(2B) is met.

39. Secondary Applicant Fees

40. In this matter, Southern Meats Pty Ltd, the review applicant, seeks to review a decision to refuse to grant subclass 482 visas to Mr Zhaonan Chen, Mrs Linyan Tang, Master Yuhan Chen and Master Yumo Chen - the visa applicants.
41. A single application fee was paid in respect of the review application.
42. The timeframe in which to pay fees for each applicant has now passed.
43. Various submissions have been made by the review applicant's representative and their latest submission of 29 November 2023 states:

Part 5 reviewable decision.

Regulation 4.12(2) is met

Reg 4.12 Combined applications for Tribunal review

(2) If:

(a) 2 or more applicants have combined their primary applications in Australia in a way permitted by Schedule 1 or regulation 2.08, 2.08A or 2.08B; and

(b) the Minister's decisions in respect of 2 or more of those applicants are that a visa not be granted; and

(c) the Minister's decisions are Part 5-reviewable decision;

the applicants referred to in paragraph (b) may combine their applications for review by the Tribunal of the Minister's decisions.

Therefore Regulation 4.13(3) is met

(3) If a person combines 2 or more applications for review by the Tribunal in accordance with regulation 4.12, an application fee is payable in respect of only 1 of those applications.

One AAT lodgement fee was required and all visa applicants, primary and as a consequence, all secondary visa applicants should be remitted back to the Department as per decision of the member.

Regulation 4.13(3) allows a person to combine 2 or more applications for review by the Tribunal in accordance with regulation 4.12, with an application fee payable in respect of only 1 of those applications.

44. In this matter the review applicant is Southern Cross Meats Pty Ltd as the sponsor of the offshore applicants.
45. The Tribunal is of the view that reg 4.12(2) only applies in circumstances where the visa applicant is also the review applicant because at 4.12(2)(a) and (b) it specifically provides that it is the applicants who have been refused their visas who can combine their applications for review. This wording is in contrast with the wording in reg 4.12(4).
46. At the applicant's request the Tribunal considered whether reg 4.12(4), which relates to nominated or sponsored members of a family unit, applied in this case:

Reg 4.12

(4) If:

(a) a person has nominated or sponsored 2 or more members of a family unit in respect of their primary applications for visas of a kind referred to in subsection 338(5) of the Act; and

(b) the Minister's decisions in respect of 2 or more of the members of that family unit are that a visa not be granted; and

(c) the Minister's decisions are Part 5-reviewable decisions;

the nominator or sponsor may combine his or her applications for review by the Tribunal of the Minister's decisions in respect of each of the members of the family unit to whom the Minister refused to grant a visa.

47.

48. While the review applicant has nominated or sponsored 2 or more members of a family unit in respect of their primary applications for visas, the Tribunal is not satisfied that these are visas of a kind referred to in subsection 338(5) of the Act which states:

49. **Section 338**

(5) A decision to refuse to grant a non-citizen a visa is a Part 5-reviewable decision if:

(a) the visa is a visa that could not be granted while the non-citizen is in the migration zone; and

(b) the non-citizen, as required by a criterion for the grant of the visa, was sponsored or nominated by:

(i) an Australian citizen; or

(ii) a company that operates in the migration zone; or

(iii) a partnership that operates in the migration zone; or

(iv) the holder of a permanent visa; or

(v) a New Zealand citizen who holds a special category visa.

50. A Temporary Skill Shortage visa (subclass 482) Labour Agreement stream does not require that the non-citizen is outside the migration zone. Therefore section 338(5) does not apply.

51. For the above reasons, the Tribunal is not satisfied that the secondary applicants in this matter are eligible to have their applications combined in accordance with regulation 4.12 and for that reason a fee was payable in respect of each applicant for the Tribunal to consider their applications.

52. As the timeframe in which to pay fees for each applicant has now passed, the Tribunal has no jurisdiction in relation to the secondary applicants listed in this matter.

53. **Concluding paragraphs**

54. On the basis of the above, the primary applicant satisfies PIC 4020 for the purposes of cl 482.217.

55. The Tribunal has no jurisdiction in relation to the secondary applicants.

DECISION

56. The Tribunal remits the application in relation to the primary applicant for GK – Temporary Skill Shortage (Class GK) visa for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 482 - Temporary Skill Shortage visas:

- Public Interest Criterion 4020 for the purposes of cl 482.217 of Schedule 2 to the Regulations.

George Hallwood
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...